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IN THE

Supreme Court of the United States

UNITED HAULERS ASSOCIATION, INC., TRANSFER SYSTEMS, INC., BLISS ENTERPRISES, INC., KEN WITTMAN SANITATION, BRISTOL TRASH REMOVAL, LEVITT'S COMMERCIAL CONTAINERS, INC., AND INGERSOLL PICKUP INC.,
Petitioners,

v.

ONEIDA-HERKIMER SOLID WASTE MANAGEMENT AUTHORITY, COUNTY OF ONEIDA, AND COUNTY OF HERKIMER,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF OF *AMICI CURIAE* NATIONAL SOLID WASTES MANAGEMENT ASSOCIATION, AMERICAN FOREST AND PAPER ASSOCIATION, INC., AMERICAN TRUCKING ASSOCIATIONS, INC., ASSOCIATION OF AMERICAN RAILROADS AND NATIONAL ASSOCIATION OF MANUFACTURERS IN SUPPORT OF THE PETITION

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INTEREST OF THE AMICI CURIAE

The National Solid Wastes Management Association ("NSWMA"), the American Forest and Paper Association, Inc. ("AF&PA"), the American Trucking Associations, Inc. ("ATA"), the Association of American Railroads ("AAR") and the National Association of Manufacturers ("NAM") respectfully submit this brief as *amici curiae* in support of the petition.[1]

NSWMA is a not-for-profit trade association whose 1700 member companies operate in all fifty states. Collectively, these private sector companies engage in nearly every aspect of solid waste management. NSWMA's members include collectors and transporters of solid waste; operators of solid waste treatment, storage and disposal facilities; waste recyclers; and firms providing legal, financial and consulting services to the waste management industry. NSWMA regularly represents its members in matters before the courts, Congress and regulatory agencies. It filed an *amicus* brief in support of the petitioner in the case of *C&A Carbone v. Clarkstown*, 511 U.S. 383 (1994), in which this Court held that Clarkstown, New York's flow control laws violated the dormant Commerce Clause.

AF&PA is the national trade association of the forest, paper and wood products industry. It represents companies engaged in growing, harvesting, and processing wood and wood fiber, manufacturing pulp, paper and paperboard

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[1] Pursuant to Supreme Court Rule 37.6, *amici curiae* state that no counsel for any party to this dispute authored this brief in whole or in part and no person or entity, other than *amici curiae* and their members, made a monetary contribution to the preparation or submission of this brief. All parties have consented to this filing in letters on file with the Office of the Clerk of this Court.

products from both virgin and recycled fiber, and producing engineered and traditional wood products. AF&PA seeks to preserve the interstate market in recyclables, which is a primary source of raw material for many AF&PA members.

ATA is a nonprofit corporation that serves as the national trade association of the trucking industry. It has over 2,000 direct motor carrier members and, in cooperation with state trucking associations and affiliated national trucking conferences, ATA represents tens of thousands of motor carriers. ATA was created to promote and protect the interests of the trucking industry, which consists of every type and geographical scope of motor carrier operation in the United States, including for-hire carriers, private carriers, leasing companies and others. ATA regularly advocates the trucking industry's position before the United States Supreme Court and other courts. ATA seeks to preserve the interstate market in solid waste and recyclable materials on behalf of the numerous ATA members already engaged in, or planning to become engaged in, the interstate transportation of such materials.

AAR is an incorporated nonprofit trade association whose members include the nation's major freight railroads and Amtrak. AAR's members operate approximately 75% of the rail industry's line haul mileage, produce 93% of its freight revenues, and employ 91% of rail employees. In matters of significant interest to its members, AAR frequently appears before Congress, administrative agencies and the courts on behalf of the railroad industry. Pertinent hereto, on behalf of some of their customers, AAR members transport waste and other refuse to and from a variety of locations throughout the United States, in excess of 900 million ton miles per year. Any court proceedings that impact this particular stream of commerce will greatly impact AAR members.

NAM is the nation's oldest and largest industrial trade association. It represents nearly 14,000 members (including 10,000 small and mid-sized companies) and 350 member associations serving manufacturers and employees in every industrial sector and all fifty states. NAM member companies and subsidiaries employ approximately 85% of manufacturing workers and produce over 80% of the nation's manufactured goods. NAM seeks to maintain open borders and free market competition between solid waste and recycling service providers in all fifty states, preserving the most cost-effective and environmentally protective solid waste disposal system in the world.

The common thread that unites the amici is their serious concern regarding the impact of the Second Circuit's decision on the functioning of the interstate market for solid waste and recycling services. Prior to this Court's decision in *Carbone*, the balkanization of that market was a major threat to the waste industry itself and to the businesses that depend on its services. By 1995, over 75% of the states had authorized flow control laws,[2] and local governments were rushing to take advantage of the opportunity to ensure the success of their local disposal facilities by preventing the waste generated in the locality from being taken anywhere else. The predictable result was an escalation of prices for solid waste disposal, as protected facilities set their rates without fear of competition. Moreover, a snowball effect was rapidly developing, as other localities were forced to respond by enacting their own flow control laws to protect

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[2] S. Rep. No. 104-52, at 5-6 (1995) (as of 1995, thirty-five states, the District of Columbia and the Virgin Islands directly authorized flow control, and an additional four states indirectly authorized it through local solid waste management plans, home rule or other mechanisms).

local facilities which previously had depended on out-of-state waste for their financial viability.

In *Carbone*, this Court unequivocally held that the challenged flow control ordinance discriminated against interstate commerce and that any "local problems," including health and environmental problems, could be solved by "the unobstructed flow of interstate commerce itself...." 511 U.S. at 393. However, localities with existing flow control laws did not acquiesce gracefully to this Court's decision. In addition to seeking legislation from Congress specifically authorizing flow control laws (which was vigorously opposed by a number of amici),[3] localities sought to

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[3] *See, e.g.*, Solid Waste Interstate Transportation Act of 2001, H.R. 1213, 107th Cong. § 2 (2001); Municipal Solid Waste Flow Control Act of 2001, H.R. 1214, 107th Cong. § 2 (2001); Solid Waste Interstate Transportation and Local Authority Act of 2001, S. 1194, 107th Cong. § 3 (2001); Solid Waste Interstate Transportation and Local Authority Act of 1999, H.R. 1190, 106th Cong. § 3 (1999); Solid Waste Interstate Transportation and Local Authority Act of 1999, S. 663, 106th Cong. § 3 (1999); Municipal Solid Waste Interstate Transportation and Local Authority Act of 1999, S. 872, 106th Cong. § 5 (1999); Municipal Solid Waste Flow Control Act of 1997, H.R. 943, 105th Cong. § 2 (1997); H.R. Res. 349, 104th Cong. § 2 (1996); State and Local Government Interstate Waste Control Act of 1995, H.R. 2323, 104th Cong. (1995); Local Governments Flow Control Act of 1995, H.R. 1085, 104th Cong. § 2 (1995); Public Debt Relief Act of 1995, H.R. 2838, 104th Cong. § 2 (1995); Municipal Waste Flow Control Transition Act of 1995, S. 485, 104th Cong. § 2 (1995); Municipal Solid Waste Flow Control Act of 1995, S. 534, 104th Cong. § 202 (1995); Flow Control Act of 1994, H.R. 4683, 103d Cong. § 1 (1994); Flow Control Act of 1994, S. 2227, 103d Cong. § 2 (1994); *Interstate Transportation of Municipal Waste and Flow Control: Hearing on S. 533, S. 663 and S. 872 Before the Senate Comm. on Environment and Public Works*, 106th Cong. (1999);

(Continued ...)

perpetuate flow control by attempting to distinguish their particular laws from those struck down in *Carbone* and by making cosmetic changes to their ordinances. Another wave of litigation ensued, and the courts are once again "clogged with cases challenging restrictions on waste-related services, making garbage the modern legal battleground over the Commerce Clause." *Huish Detergents, Inc. v. Warren County*, 214 F.3d 707, 713 (6th Cir. 2000). The courts promptly overturned many of these laws,[4] and localities gradually have been brought into compliance with their Commerce Clause obligations.

Transportation and Flow Control of Solid Waste: Hearing Before the Senate Comm. on Environment and Public Works, 105th Cong. (1997); S. Rep. No. 103-322 (1994); H.R. Rep. No. 103-738 (1994).

[4] *See, e.g., Huish Detergents*, 214 F.3d at 715-16; *U & I Sanitation v. City of Columbus*, 205 F.3d 1063 (8th Cir.), *reh'g and reh'g en banc denied*, 2000 U.S. App. LEXIS 5173 (8th Cir. Mar. 24, 2000); *Waste Mgmt., Inc. v. Metro. Gov't*, 130 F.3d 731 (6th Cir. 1997), *cert. denied*, 523 U.S. 1094 (1998); *Atl. Coast Demolition & Recycling, Inc. v. Bd. of Chosen Freeholders*, 48 F.3d 701, 712 (1995), *reh'g and reh'g en banc denied*, 1995 U.S. App. LEXIS 6454 (3d Cir. Mar. 28, 1995); *Coastal Carting Ltd. v. Broward County*, 75 F. Supp. 2d 1350 (S.D. Fla. 1999); *Randy's Sanitation, Inc. v. Wright County*, 65 F. Supp. 2d 1017 (D. Minn. 1999); *Condon v. Andino, Inc.*, 961 F. Supp. 323 (D. Me. 1997); *Waste Recycling, Inc. v. Southeast Ala. Solid Waste Disposal Auth.*, 814 F. Supp. 1566 (M.D. Ala. 1993), *aff'd mem.*, 29 F.3d 641 (11th Cir. 1994); *City of Paterson v. Passaic County Bd. of Chosen Freeholders*, 753 A.2d 661 (N.J. 2000); and *Heier's Trucking, Inc. v. Waupaca County*, 569 N.W.2d 352 (Wis. Ct. App. 1997).

The decision of the Second Circuit, Pet. App. at 1a-33a, threatens to undo much that has been accomplished. It provides a blueprint by which a municipality, county or state can readily re-activate flow control as to any publicly owned facility and can extend flow control to privately owned facilities by the simple expedient of restructuring its financial arrangement with such facility to vest ownership in a public entity. Given the active and continued resistance of many local, county and state governments to this Court's *Carbone* decision, *amici* have no doubt that local, county and state governments will be quick to take advantage of this perceived new opportunity. Prompt review by the Court is thus essential to ensure that the interstate trade in solid waste and recyclables and the constitutional principles underlying the Commerce Clause are not once again thwarted.

SUMMARY OF ARGUMENT

Unless the decision of the court below is promptly reversed, the interstate market in solid waste and recyclables will be seriously disrupted. Almost half of the nation's waste facilities currently are owned by public entities.[5] The Second Circuit's decision, by providing a blueprint for governments to evade *Carbone*, virtually ensures that flow control laws promptly will be re-enacted with respect to many of those facilities, thereby locking millions of tons of waste out of the interstate market. Such effects will not be limited to states in the Second Circuit. Waste from those states currently is moving to facilities in at least five other Northeastern and Midwestern states. Moreover, a snowball effect is inevitable,

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[5] R.W. Beck & Chartwell Information Publishers, *Size of the United States Solid Waste Industry, Directory & Atlas of Solid Waste Disposal Facilities 2001* Tbl. ES-2 at ES-3 (Apr. 2001) (47.5% of waste facilities are publicly owned).

as localities faced with the sudden loss of solid waste on which their own waste facilities depend seek to protect their own financial interests, both by reinstituting flow control for their publicly owned facilities and by converting those that are now privately owned. In addition, facilities designated under flow control ordinances serve as a source of substantial financial revenue to hard-pressed jurisdictions, which, based on past experience, can be expected to charge above-market rates for waste disposal.

The Second Circuit's decision is at odds with both modern business realities and this Court's current Commerce Clause jurisprudence. By making the constitutionality of a flow control ordinance turn on the technical issue of ownership of the favored facility, the court below has ignored the practical economic effect of the ordinance – which this Court repeatedly has emphasized is the key determinant when analyzing issues of discrimination against interstate commerce. *Am. Trucking Ass'ns v. Scheiner*, 483 U.S. 266 (1987) ("*ATA*"); *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274 (1977). The effect of flow control on competing out-of-state waste facilities and on the haulers, interstate trucking companies, railroads and barge lines that seek to transport waste to those facilities is the same regardless of whether the favored local facility is privately or publicly owned. The effect also will be felt by the generators who use these facilities. This Court, in *Carbone*, already has concluded that the economic effects of flow control are "interstate in reach," 511 U.S. at 389, and that such laws discriminate against interstate commerce. A difference in the ownership of the facilities favored by a flow control ordinance cannot change that reality.

ARGUMENT

I. THE SECOND CIRCUIT'S DECISION, IF NOT PROMPTLY OVERTURNED, WILL RESULT IN SERIOUS DISRUPTIONS TO THE INTERSTATE MARKET IN SOLID WASTE DISPOSAL SERVICES.

Since *Carbone* was decided, it has been understood by all parties with a stake in solid waste disposal – including municipalities and counties as well as solid waste facility operators, recyclers and haulers – to apply to privately owned and publicly owned facilities alike. This seemed apparent from *Carbone* itself, where the transfer station protected by the flow control ordinance was privately owned at the time of the litigation but was scheduled to revert to municipal ownership shortly after the Court issued its decision.[6] Yet despite the filing of an amicus brief urging this Court to limit its decision to privately owned facilities[7] and a vigorous dissent urging that the Clarkstown ordinance be upheld because the "one proprietor so favored is essentially an agent of the municipal government,"[8] the majority opinion did not even hint that the constitutionality of the ordinance might hinge on whether the case was decided before or after Clarkstown exercised its option to purchase the facility.

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[6] *Carbone*, 511 U.S. at 383; *Carbone*, R. on Appeal at 128.

[7] *See* Brief of *Amicus Curiae* City of Springfield, Missouri at 11-15, *Carbone* (No. 92-1402).

[8] *Carbone*, 511 U.S. at 416 (Souter, J., dissenting). Moreover, the Clarkstown ordinance on its face referred to the designated transfer station as "the Town of Clarkstown solid waste facility...." *Id.* at 396.

In the aftermath of *Carbone*, at least three courts of appeals and two district courts invalidated flow control laws where the facility at issue was publicly owned.[9] Moreover, two district courts that had occasion to address the significance of public versus private ownership of waste facilities both concluded that public ownership made no difference.[10]

In this context, the decision below threatens an immediate and massive disruption of the post-*Carbone* solid waste market that will extend far beyond the Second Circuit

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[9] *See U & I Sanitation*, 205 F.3d at 1065-66, 1071-72 (city-owned transfer station); *Waste Mgmt.*, 130 F.3d at 733, 736 (publicly owned waste-to-energy facility); *Harvey & Harvey, Inc. v. County of Chester*, 68 F.3d 788, 794 (3d Cir. 1995) (county-owned landfills), *cert. denied*, 516 U.S. 1173 (1996); *Zenith/Kremer Waste Sys., Inc. v. Western Lake Superior Sanitary Dist.*, No. 5-95-228, 1996 WL 612465, at **1-3, 10 n.13 (D. Minn. July 2, 1996) (waste-to-energy facility owned by waste district); and *Connecticut Carting Co. v. Town of East Lyme*, 946 F. Supp. 152, 154 (D. Conn. 1996) (publicly owned waste disposal plant).

[10] *See Southcentral Pa. Waste Haulers Ass'n v. Bedford-Fulton-Huntington Solid Waste Auth.*, 877 F. Supp. 935, 943 (M.D. Pa. 1994) (invalidating a flow control law and stating that the Court was "not persuaded that the public nature of the [designated] facility changes the applicable analysis"). *See also Pine Ridge Recycling v. Butts County*, 855 F. Supp. 1264, 1275 (M.D. Ga. 1994) (finding that local government officials "engineered to prohibit a competitor from entering the waste disposal market" in order to subsidize construction of a new publicly owned landfill, and explaining that "[i]t should make little difference that the [waste authority] owns its [landfill] currently and the facility in *Carbone* would be turned over to the town after five years of private operation. Such a distinction would focus on form and ignore substance.").

itself. First, as to the immediate impact, the states that lie within the Second Circuit – New York, Connecticut and Vermont – are among the most prolific waste-exporting states in the Nation, and the states that currently receive waste from New York, Connecticut and Vermont include states located in four Circuits. New York alone exported nearly 7 million tons of waste in 2000, including 4.7 million tons to Pennsylvania, 1 million tons to Virginia, 648,000 tons to New Jersey, and 466,000 tons to Ohio. Connecticut exported over half a million tons of waste in 2000, including 428,494 tons to Pennsylvania, 125,988 tons to Ohio, and some to New Jersey. Vermont exported 88,350 tons of waste in 1999, primarily to New Hampshire and New York. [11]

Moreover, a high percentage of the 717 waste facilities in the Second Circuit are publicly owned: over 90% in Connecticut, over 75% in New York, and over 80% in Vermont. Thus, if the Second Circuit's decision is not overturned, local governments in these states will be free to re-institute flow control laws with respect to over 80% of the transfer stations, over 70% of the landfills, and over 60% of the waste-to-energy facilities in the region, thereby depriving competitors in at least five other states of the solid waste now moving to out-of-state facilities in the free interstate market.[12] Overall, millions of tons of solid waste are susceptible to immediate "hoarding" by trash-hungry localities in the Second Circuit if the decision below is allowed to stand.

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[11] James E. McCarthy, *CRS Report for Congress: Interstate Shipment of Municipal Solid Waste: 2001 Update* at Tbl. 4 (July 19, 2001).

[12] Chartwell Information Publishers, *The Directory & Atlas of Solid Waste Disposal Facilities 2000*, at 150-64, 559-634, 852-65 (5th ed. 2000).

Indeed, the entire intricate web of solid waste companies and facilities that provide cost-effective service to residents, businesses and local governments in the Northeast and throughout the United States will be impacted adversely unless the Second Circuit decision is overturned. Many local and national waste collection companies in the Northeast and elsewhere collect trash and dispose of it at transfer stations owned by private waste companies. These companies, in turn, contract with long-haul trucking companies, railroads or barges to transport trash from the transfer stations to landfills and waste-to-energy plants in other states.[13] In New York, numerous waste collectors operating in counties with publicly owned disposal facilities currently dispose of waste at facilities in other states. If the Court does not overturn the decision below, local governments in those counties will be able to initiate monopolies, or reestablish their pre-*Carbone* monopolies, on solid waste disposal services. This will have immediate adverse consequences for companies that have acquired, constructed or expanded state-of-the-art facilities in other states in reliance on the assumption that they would be able to compete freely in the interstate market for the solid waste needed to operate those facilities efficiently.

The Second Circuit's decision similarly threatens the interstate market in recyclables, as flow control measures often encompass recyclable materials in addition to solid

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[13] In New York City alone, more than 150 licensed haulers collect commercial and industrial solid waste. Virtually all of the thousands of tons of New York City solid waste collected daily by these haulers is processed at transfer stations and disposed of at landfills or waste-to-energy plants in New Jersey, Pennsylvania, Virginia, Ohio and other states. *See* Eric Lipton, *City Trash Follows Long and Winding Road*, N.Y. Times, Mar. 24, 2001.

waste.[14] Flow control measures restricting delivery of recyclables to local, publicly owned facilities to the detriment of competing out-of-state facilities will seriously disrupt the interstate market for recyclables and the industries that depend on that market.[15]

Counties and municipalities in other Circuits can hardly be expected to stand idly by while those in the Second Circuit take advantage of their new-found ability to hoard waste for their publicly owned facilities. In Pennsylvania, for example, which received 4.7 million tons of waste from New York in 2000, or in other states, a loss of New York-origin waste will undoubtedly lead to flow control laws as local governments act to hoard all of their own "home-grown" product. The resulting spiral of protectionist legislation is precisely the evil that *Carbone* was intended to halt. *See Carbone*, 511 U.S. at 390 ("The central rationale for the rule against discrimination is to prohibit state or municipal laws whose object is local economic protectionism, laws that would excite those jealousies and retaliatory measures the Constitution was designed to prevent.").

Nor will the effects of the Second Circuit's decision be limited to those facilities that are publicly owned at this moment in time. New facilities will undoubtedly be structured so as to incorporate public ownership. Moreover, there is nothing to prevent a county or municipality that is currently providing financial support to a privately owned facility (as Clarkstown did in *Carbone*) from restructuring its

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[14] In the case at bar, the local flow control ordinances apply to both solid waste and recyclables. Pet. App. at 5a-6a.

[15] *See, e.g., U & I Sanitation*, 205 F.3d at 1069 (discussing the interstate effect of flow control on the recyclables market).

relationship with the private company so as to vest ownership in a public body – and thereby make itself eligible for flow control. Under the Second Circuit's decision, there is no requirement that the waste facility be publicly owned from the outset. Presumably a formerly private facility converted to a publicly owned facility would be entitled to the benefit of flow control laws once the conversion had been accomplished.[16] Nor does the Second Circuit's decision require the city or county itself to become the owner of the facility. Indeed, in this case the two counties involved created a "waste management authority" to acquire ownership of the facilities.[17] And because the "public owner" is free under the Second Circuit's decision to hire a private company to actually operate the facility,[18] there is little, if any, disincentive to conversion.

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[16] Under the Second Circuit's rationale, it would appear that even Clarkstown, New York – whose flow control ordinance was declared unconstitutional by this Court in *Carbone* – could attempt to argue that its ordinance will become constitutional the moment it exercises its option to purchase the facility.

[17] Under the agreement between the Counties and the waste management authority, the Authority is to manage and dispose of all solid waste within the Counties and operate the local energy recovery facility and recycling center. In return, the Counties guarantee the Authority's operating costs and debt service payments. Pet. App. at 4a-5a. As a practical matter, such an arrangement is virtually indistinguishable from the arrangement in *Carbone* between the city and the owner of the favored facility.

[18] In the case at bar, the Authority chose to operate four of the five waste facilities itself, while contracting with a privately owned company to operate the fifth facility. Pet. App. at 6a-7a.

Given the enormous financial benefits that flow control laws can bring to a local government, there can be little doubt that counties and municipalities will quickly move to take advantage of the conversion option wherever possible. While this will necessarily require the cooperation of existing private owners, the monopoly profits made possible by flow control should be more than enough to outweigh the costs of conversion and make the conversion desirable for both the local government and the private owner. Thus, the financial balance is likely to weigh heavily in favor of conversion, further exacerbating the pernicious effects of the decision below.

II. THE SECOND CIRCUIT'S EMPHASIS ON FACILITY OWNERSHIP IS AT ODDS WITH MODERN BUSINESS REALITIES AND THIS COURT'S CURRENT COMMERCE CLAUSE JURISPRUDENCE.

The essential premise of the Second Circuit's decision is that there is such a fundamental difference between privately owned and publicly owned waste facilities that a different set of Commerce Clause principles should apply. This premise, however, is simply wrong. In today's world, public and private waste facilities are equal in the eyes of regulators and the market. The decision as to whether a particular facility should be structured as a publicly owned or privately owned entity is, but for the Second Circuit's decision, typically driven by practical business considerations, such as the most advantageous financing mechanism, potential tax consequences, and potential liability issues, that are wholly unrelated to the theoretical concepts that underlie the Second Circuit's decision.

In this context, it makes no sense to conclude, as did the Second Circuit, that the constitutionality of flow control laws enacted to funnel all trash in the jurisdiction to a local facility

should turn on whether that facility is publicly or privately owned. This is highlighted by the fact that in over 500 counties throughout the United States, including more than thirty-five counties in New York alone, there is a mix of privately owned and publicly owned waste facilities.[19] In such counties, private sector landfills, waste-to-energy facilities and transfer stations compete directly with publicly owned facilities for solid waste. Under the Second Circuit's decision, a flow control law would be valid as to the publicly owned facilities in these counties and invalid as to the privately owned facilities, even though the difference in ownership has no practical impact either on the way in which the flow control law affects interstate commerce or on the day-to-day operation of the facilities. Constitutionality would turn not on an ordinance's effect on interstate commerce, but on the mere happenstance of who holds ownership in the particular facilities.

This myopic focus on ownership is at odds with both the general thrust of modern business law and this Court's current Commerce Clause jurisprudence. From the business law perspective, the clear trend is to look to the substance of a transaction, rather than technical ownership. A prime example is found in Article 9 of the Uniform Commercial Code ("UCC"), which has been adopted by all fifty states and the District of Columbia. Since 1962, the UCC has provided that the location of title to collateral (*i.e.*, ownership) generally is immaterial for purposes of determining the rights and duties of parties to a secured transaction.[20] This simply

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[19] *Directory & Atlas of Solid Waste Disposal Facilities 2000*, *supra* note 12, at 559-634.

[20] *See* U.C.C. § 9-202 (2000).

reflects the reality that property ownership is no longer of talismanic significance in business transactions.

The Second Circuit's "form over substance" approach is also contrary to this Court's current Commerce Clause jurisprudence. Addressing the Commerce Clause issues raised by certain state taxes on interstate motor carriers, this Court in *ATA* emphasized that it had "'moved toward a standard of permissibility of state taxation, based upon its actual effect rather than its legal terminology.'" 483 U.S. at 295 (quoting *Complete Auto Transit v. Brady*, 430 U.S. 274, 281 (1977)). Eschewing the "metaphysical approach to the Commerce Clause that focused primarily on the character of the privilege rather than the practical consequences of the tax," *id.* at 294-95, the Court evaluated the constitutionality of the challenged taxes on the practical basis of "whether the tax produces a forbidden effect." *Complete Auto Transit*, 430 U.S. at 288. The same approach was followed in *Carbone*, where this Court focused on the fact that the "economic effects [of the flow control law] are interstate in reach" and concluded that "[t]hese economic effects are more than enough to bring the Clarkstown ordinance within the purview of the Commerce Clause." 511 U.S. at 389.

From a practical standpoint, it is clear that the "effect" of local flow control laws on interstate commerce is no different when the favored local facility is publicly owned than when it is privately owned. In either case, the "guarantee of a free trade area among States," 483 U.S. at 281, is violated when a local government forces all trash in its jurisdiction to go to a local facility. From the perspective of the out-of-state waste facilities that can no longer compete for trash generated in a particular county or municipality, it is irrelevant whether the local facility that is the beneficiary of the flow control ordinance is owned by a private entity or by the local waste authority. In either event, the "protectionist effect of the ordinance," *Carbone*, 511 U.S. at 392, is the same – the

locally generated waste is hoarded for the benefit of the local facility and the out-of-state competitors are shut out of the market.

Similarly, the effect on the local trash haulers is the same, regardless of whether the facility designated by the flow control laws is publicly owned or privately owned. In either case, those haulers who had been hauling trash to out-of-state waste facilities will now have to take that trash to the designated local facility – and pay the higher tipping fee charged by that facility.[21] They too are being deprived of access to the interstate market for solid waste services, contrary to the precepts of the Commerce Clause.

Regardless of whether flow control laws favor publicly or privately owned facilities, the ripple effect of such laws will be felt throughout the interstate transportation industry. A revitalization of flow control will prevent railroads and barges from accessing the interstate market for solid waste services. Railroads and barge lines increasingly are entering into contracts for the long-distance transport of high volumes of trash to out-of-state disposal facilities. By forcing waste to be taken to local facilities, flow control laws of the sort permissible under the Second Circuit's decision will adversely impact those railroads and barges already engaged in, or planning to become engaged in, the interstate transportation of waste by rail and inland waterways, respectively.

The Second Circuit's decision will affect not only those businesses specifically engaged in the interstate trans-

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[21] As the Second Circuit itself recognized in the case at bar, "[e]ven the lowest tipping fee charged under the Counties' scheme is higher than the market value for the disposal services the Authority provides." Pet. App. at 9a.

portation of waste, but the multitude of ordinary businesses that generate waste. Most obviously, the institution – or reinstitution – of local government monopolies over solid waste disposal will prevent such waste generators from reaping the benefits of a competitive marketplace for disposal services, including the ability to shop for price, quality of service, and indemnification from environmental liability.

The Second Circuit's belief that a flow control law forcing trash to go to a publicly owned facility is "less likely to give rise to retaliation and jealousy from neighboring states," Pet. App. at 28a, than one that forces trash to go to a privately owned facility is simply naïve. The effect on an out-of-state waste facility that is shut out of a market by flow control is the same, regardless of who owns the favored facility, as is the effect on the municipality or county in which that out-of-state facility is located. A local government in a neighboring state that finds its financial well-being jeopardized by the loss of business experienced by its own waste facility is unlikely to eschew "retaliatory" measures simply because the flow control law responsible for its problems is directing waste to a publicly owned, rather than a privately owned, facility. Realistically, each local jurisdiction will act to protect its own interests – including, when necessary, retaliatory measures against other localities. This is precisely what the Commerce Clause was intended to prevent.

CONCLUSION

For the reasons stated herein, the petition for certiorari should be granted and the decision below should be reversed.

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